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No. 91-1529

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v.

DWAYNE EDWARD POLIDORI,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table Of Authorities ii

Statement Of The Case 1

Reasons For Denying Writ Of Certiorari 2

Conclusion 16

Appendices 17

TABLE OF AUTHORITIES

CASE LAW

California v Ciraolo, 476 US 207; 90 L Ed 2d 210; 106 S Ct 1809 (1986) 10

Commonwealth v Manni, 398 Mass 741; 500 NE2d 807 (1986) 14

Commonwealth v Stanley, 498 Pa 326; 446 A2d 583 (1982) 14

Gouled v United States, 255 US 298; 65 L Ed 647; 41 S Ct 261 (1921) 3

Ker v California, 374 US 23; 10 L Ed 2d 726; 83 S Ct 1623 (1963) 3

Miller v United States, 357 US 301; 78 S Ct 1190; 2 L Ed 2d 1332 (1958) 6

Munoy v United States, 325 F2d 23 (9th Cir. 1963) 14

New York v Harris, 495 US 14; 109 L Ed 2d 13; 110 S Ct 1640 (1990) 10-11

Payton v New York, 445 US 573; 63 L Ed 2d 639; 100 S Ct 1371 (1980) 6, 10-11

People v Harvey, 38 Mich App 39; 195 NW2d 773 (1972) 13

People v *Hirsch*, 71 Cal. App 3d 987; 140 Cal. Rptr. 13 (1977) 14

Segura v *United States*, 468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984) 11-13

Silverman v *United States*, 365 US 505; 5 L Ed 2d 734; 81 S Ct 679 (1961) 6

Smanyne's Case, Coke 91, 77 Eng. Rep. 194 (K.D. 1603) 2

State v *Bates*, 120 Ariz 561; 587 P2d 747 (1978) 14

United States v *Adage Gomez*, 488 F2d 4 (9th Cir. 1973) 4

United States v *Calandra*, 414 US 338; 94 S Ct 613; 38 L Ed 2d 5 (1974) 8

United States v *Case*, 435 F2d 766 (7th Cir. 1970) 5

United States v *Chapman*, 384 F Supp 1232 *aff'd without op* 523 F2d 1054 (5th Cir. 1975) 5

United States v *De Lutis*, 722 F2d 902 (1st Cir. 1983) 14

United States v *Francis*, 646 F2d 251 (1981) 3

United States v *Harris*, 713 F2d 623 (11th Cir. 1983) 7

United States v *Mapp*, 476 F2d 67 (2nd Cir. 1973) 7

United States v *Metz*, 608 F2d 142 (5th Cir. 1979) 7

United States v *Murrie*, 534 F2d 695 (6th Cir. 1976) 5

United States v *McConney*, 728 F2d 1195 (9th Cir. 1984) 5

United States v *Pratter*, 465 F2d 227 (7th Cir. 1972) 14

United States v *Rambo*, 789 F2d 1289 (8th Cir. 1986) 7

United States v *Valenzuela*, 596 F2d 824 (1979) 3

United States v *Watson*, 423 US 411; 46 L Ed 2d 598; 96 S Ct 820 (1976) 11

United States v *Whitney*, 633 F2d 902 (9th Cir. 1980) 5

Warden, Maryland Penitentiary v *Hayden*, 357 US 294; 18 L Ed 2d 782; 87 S Ct 1642 (1963) 3

STATUTES AND COURT RULES

18 USC §3109 . . . . . 3, 5-6

42 USC §1983 8

MCL 780.656; MSA 28.1259(6) 1-2

MCL 780.657; MSA 28.1259(7) 1, 8

OTHER

La Fave, A Treatise on the Fourth Amendment, Second Edition (1987), ch. 6, p. 611 5

Sonneneick & Ebner, No-Knock and Nonsense, An Alleged Constitution Problem, 44 St. John's L. Rev. 626, 647 (1970) 4

STATEMENT OF THE CASE

Respondent accepts the facts as stated in Petitioner's "Statement Of The Case", with the following addition. The trial court's ruling that noncompliance with Michigan's "knock and announce" statutes, MCL 780.656; MSA 28.1259(6), failed to implicate the exclusionary rule, was predicated upon another Michigan statute which made noncompliance a misdemeanor offense, MCL 780.657; MSA 28.1259(7). During oral argument before the Michigan Court of Appeals, Petitioner was unable to cite any instance where a police officer had been prosecuted for violation of this statute.

REASONS FOR DENYING WRIT OF CERTIORARI

The requirement that police officers give notice prior to executing a search warrant authorizing entry into a private residence, dates back to England in 1603, in *Smanyne's Case*.[1] Before an officer of the Crown could forcibly enter a residence to make an arrest, "he ought to signify the cause of his coming, and to make request to open the doors." Since that date, many jurisdictions including Michigan,[2] have enacted "knock and announce statutes". These statutes typically require that the officer executing the search warrant first announce his identity and purpose

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[1]5 Coke 91, 77 Eng. Rep. 194 (K.D. 1603).

[2]MCL 780.656; MSA 28.1259(6): The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

prior to forcing entry. In addition to both the common law and knock and announce legislation, this Court has held that absent exigent circumstances, the requirement that police announce their identity and purpose prior to forced entry, is constitutionally mandated by the Fourth Amendments prohibition against unreasonable searches and seizures.[3] Similarly, other courts have held that the knock and announce requirement is rooted in Fourth Amendment protections.[4]

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[3]*Gouled v United States*, 255 US 298; 65 L Ed 647; 41 S Ct 261 (1921), (disapproved on other grounds *Warden, Maryland Penitentiary v Hayden*, 357 US 294; 18 L Ed 2d 782; 87 S Ct 1642 (1963); *Ker v California*, 374 US 23; 10 L Ed 2d 726; 83 S Ct 1623 (1963).

[4]"Though each case by itself is less than compelling, their conclusion has been unanimous: The Fourth Amendment forbids the unannounced, forcible entry of a dwelling in the absence of exigent circumstances, *United States v Francis*, 646 F2d 251, 258 (1981); *See also, United States v Valenzuela*, 596 F2d 824, 830 (1979), 'As we have recognized in light of *Ker v California*, 374 US 23; 10 L Ed 2d 726; 83 S Ct 1623 (1963), '[i]t is now clear that, to some extent, [the knock-notice requirements of 18 USC §3109] have been incorporated into the Fourth Amendment.'"

While some have referred to the protections of the notice requirements as "somewhat tenuous",[5] several substantial and compelling interests are served by the rule.[6]

Although a few jurisdictions have grappled with the question of whether the knock and announce requirement is rooted in the Fourth Amendment, for the most part, the requirement has been subjected to a "reasonableness" analysis:

> In the main, however, it seems fair to say, as is commonly assumed in the cases, that these statutes [knock and announce] declare what is ordinarily

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[5]Sonneneick & Ebner, No-Knock and Nonsense, An Alleged Constitution Problem, 44 St. John's L. Rev. 626, 647 (1970).

[6]1. It reduces the potential for violence to both the police officers and the occupants of the house into which entry is sought;

2. It guards against the needless destruction of private property; and

3. It symbolizes the respect for individual privacy summarized in the adage that "a man's house is his castle", *United States v Adage Gomez*, 488 F2d 4 (9th Cir. 1973).

> necessary to conform to the reasonableness requirement of the Amendment.[7]

Thus, the majority of states, as well as federal circuits, have held that the protections afforded a resident of a private dwelling against unannounced forced entry are indeed founded in the Fourth Amendment.[8] Petitioner's attempt to relegate the knock and announce statute to that of a "state procedural statute" lacking in constitutional underpinnings is without merit:

> The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should

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[7]La Fave, A Treatise on the Fourth Amendment, Second Edition (1987), ch. 6, p. 611.

[8]Title 18 USC, §3109, codifies a tradition embedded in Anglo-American law and declares the reverence which the law attaches to an individual's right of privacy in his house, ***United States v Whitney***, 633 F2d 902 (9th Cir. 1980); There is no dispute that the requirements of §3019 are rooted in constitutional values, ***United States v McConney***, 728 F2d 1195 (9th Cir. 1984); ***United States v Case***, 435 F2d 766 (7th Cir. 1970); ***United States v. Murrie***, 534 F2d 695 (6th Cir. 1976); ***United States v Chapman***, 384 F Supp 1232, *aff'd without op* 523 F2d 1054 (5th Cir. 1975).

> not be given a grudging application. Congress, codifying a tradition embedded in Anglo-American law, had declared in §3109 the reverence of the law for the individual's right of privacy in his house.[9]

This Court has persistently held that where the Fourth Amendment violation complained of involves the sanctity of one's home rather than some other constitutionally protected area, the courts must remain diligent in their effort to protect against unlawful intrusions.[10]

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[9] ***Miller v. United States***, 357 US 301; 78 S Ct 1190; 2 L Ed 2d 1332 (1958).

[10] "The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: 'The right of the people to be secure in their . . . houses . . . shall not be violated.' That language unequivocally establishes the proposition that '[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" ***Payton v New York***, 445 US, at 589-590; 63 L Ed 2d 639; 100 S Ct 1371 (1980). (quoting ***Silverman v United States***, 365 US 505, 511; 5 L Ed 2d 734; 81 S Ct 679 (1961)).

The protection against unannounced forced entries is of course not absolute. Numerous exceptions to the application of the exclusionary rule have been carved out in the context of knocking and announcing presence and purpose. In the event exigent circumstances exist, such as the destruction of evidence, or where the act of announcing presence and purpose would constitute a "useless gesture", the courts have consistently held that technical violations of the statute are "reasonable" under the circumstances and fail to evoke the sanctions of the exclusionary rule.[11]

Petitioner has noted that Michigan law makes it a misdemeanor offense for police to violate the "knock

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[11] ***United States v Mapp***, 476 F2d 67 (2nd Cir. 1973), rapid footsteps away from door; ***United States v Rambo***, 789 F2d 1289 (8th Cir. 1986), door slammed on police; ***United States v Harris***, 713 F2d 623 (11th Cir. 1983), defendant suspicious of undercover officer; ***United States v Metz***, 608 F2d 142 (5th Cir. 1979), possible destruction of evidence.

and announce" statute.[12] Respondent is unaware of any decision willing to substitute the misdemeanor sanction of a criminal statute for that of the exclusionary rule when it comes to forcible intrusion into a private residence.

As stated by Petitioner, "application of the rule has been restricted to three areas where its remedial objectives are thought most efficacious served".[13] The fact that both sides are unaware of any prosecution of police under the Michigan statute since its inception, belies the contention that the criminal statute is capable of serving as an effective deterrent. Civil litigation under 42 USC §1983 and applicable state tort law in the context of an admitted drug dealer suing for illegal entry by police is so unrealistic, that

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[12]MCLA 780.657; MSA 28.1259(7): Any person who in executing a search warrant, wilfully exceeds his authority or exercises it with unnecessary severity, shall be fined not more than $1,000.00 or imprisoned not more than 1 year.

[13]*United States* v *Calandra*, 414 US 338, 348; 94 S Ct 613; 38 L Ed 2d 5 (1974).

there would be little, if any, incentive for police to think twice about engaging in an unlawful and unconstitutional forced entry.

A prior judicial determination of probable cause to search before police conduct a forced entry into a private residence, is only a portion of the protection afforded under the Fourth Amendment. Citizens are not being granted the right to "rush to the nearest toilet to begin dispensing with the evidence".[14] Rather, the citizen is being protected against dangerous and sometimes erroneous intrusions into their most intimate and prized possession, their personal residence. Not to mention, the physical and psychological damage incurred. Despite the proliferation of drugs and its concomitant horrors, the "war against drugs" must not be permitted to serve up the Fourth Amendment as one of its casualties.

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[14]Petition for Writ of Certiorari, Page 13, f.n.3.

Petitioner cites ***New York*** *v* ***Harris***, 495 US 14; 109 L Ed 2d 13; 110 S Ct 1640 (1990), as precedent for the position that as long as the entry was based upon probable cause, the unlawful nature of the entry failed to evoke the sanctions of the exclusionary rule. Granted, ***Harris***, did limit the application of the exclusionary rule where a violation of the rule announced in ***Payton***, *supra*, occurred.[15] However, this Court pointed out the critical fact that the statement held admissible in ***Harris***, was one taken not inside the home but rather at the station house.[16]

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[15]445 US 573; 63 L Ed 2d 639; 100 S Ct 1371 (1980).

[16]In light of these principles, we decline to apply the exclusionary rule in this context because the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime, ***Harris***, at page 20. *See also,* ***California*** *v* ***Ciraolo***, 476 US 207, 212-213; 90 L Ed 2d 210; 106 S Ct 1809 (1986) ("The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy exceptions are most heightened").

Clearly, this Court's opinion in ***Harris***, represents a retreat from the application of the exclusionary rule where an accused is arrested in violation of ***Payton***, *supra*, but it does not stand for the proposition assigned to by Petitioner that ***Harris***, lessens the privacy rights and/or application of the exclusionary rule for violations that occur within the confines of ones personal residence.[17]

Also cited by Petitioner is the case of ***Segura*** *v* ***United States***,[18] which created an "independent source" exception to the exclusionary rule. In ***Segura***,

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[17]Payton itself emphasized that our holding in that case stemmed from the "overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic." 445 US, at 601; 63 L Ed 2d 639; 100 S Ct 1371. Although it had long been settled that a warrantless arrest in a public place was permissible as long as the arresting officer had probable cause, *see* ***United States v. Watson***, 423 US 411; 46 L Ed 2d 598; 96 S Ct 820 (1976), Payton nevertheless draw a line at the entrance to the home. This special solicitude was necessary because 'physical entry of the home is the chief evil against which the recording of the Fourth Amendment is directed.'" ***Harris***, at page 17.

[18]468 US 796; 104 S Ct 3380; 82 L Ed 2d 599 (1984).

this Court held that an initial illegal entry by police would not cause the suppression of evidence where there was an independent source for the warrant under which the evidence was seized. However, this Court did not review the suppression of evidence ordered by the Court of Appeals as a result of the initial illegal entry.[19]

More importantly, this Court distinguished between the possessory rights affected by a "seizure" and those privacy interests affected by a "search":

> As we have noted, however, a seizure affects only possessory interests, not privacy interests. Therefore, the heightened protection we accord privacy interests is simply not implicated where a seizure of premises, not a search is at issue, *Segura*, at 810.

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[19]The only issue here is whether drugs and the other items not observed during the initial entry and first discovered by the agents the day after the entry under an admittedly valid search warrant, should have been suppressed, *Segura*, at page 804.

In the instant case, the violation of the knock and announce statute implicates rights which protect against an unlawful "search" of the premises rather than a "seizure" from within. Furthermore, *Segura*, involved a nonconsentual entry rather than a forced one. It is the latter which the Fourth Amendment traditionally sought to protect against.

The elapsed time from announcing authority and purpose to forced entry in this case was estimated to be between three (3) and six (6) seconds. Michigan, as well as other jurisdictions, have interpreted a reasonable time to wait prior to forced entry as the length of time it would take the occupant to reach the door from the farthest room in the house.[20] Numerous decisions have held that a short delay between knocking and announcing and forced entry

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[20] *People v Harvey*, 38 Mich App 39; 195 NW2d 773 (1972).

will not pass constitutional muster.[21]

If the Fourth Amendment prohibits an unannounced forced entry, then the elapsed time from announcement to entry must also be "reasonable". It would hardly be appropriate to require police to announce their presence and purpose and then permit them to simultaneously force entry. Absent some exigent circumstance, a citizen must be given the opportunity to answer the door to his residence before armed intruders forcibly enter same. For purposes of the Fourth Amendment, it should not matter whether the residence is in fact the suspected drug house mentioned in the search warrant, or the mistaken

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[21] ***State v Bates***, 120 Ariz 561; 587 P2d 747 (1978), 3 to 5 second delay unreasonable; ***People v Hirsch***, 71 Cal. App 3d 987; 140 Cal. Rptr. 13 (1977), 5 second delay unreasonable; ***Commonwealth v Manni***, 398 Mass 741; 500 NE2d 807 (1986), simultaneous entry unreasonable; ***United States v Pratter***, 465 F2d 227 (7th Cir. 1972), 10 to 15 second delay unreasonable; ***Munoy v United States***, 325 F2d 23, (9th Cir. 1963), practically instantaneously entry unreasonable; ***United States v De Lutis***, 722 F2d 902 (1st Cir. 1983), 20 seconds deemed adequate; ***Commonwealth v Stanley***, 498 Pa 326; 446 A2d 583 (1982), 20 second delay unreasonable.

residence next door.

CONCLUSION

WHEREFORE, Respondent prays that this Court deny plenary review, and affirm the holding of the Michigan Court of Appeals.

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APPENDICES

Respondent is satisfied with Appendix "A", "B" and "C", as set forth in the Petition For A Writ Of Certiorari, filed by Petitioner.